STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 21, 2000
v	No. 216502 Montcalm Circuit Court
DARRELL DUANE PUTANSU, Defendant-Appellant.	LC No. 98-000204-FC

Before: Neff, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of involuntary manslaughter, MCL 750.321; MSA 28.553, stemming from the death of another man after a fist fight. The trial court sentenced defendant to five to fifteen years' imprisonment. Defendant appeals by right. We affirm.

I

Defendant argues that the trial court abused its discretion by excluding evidence of the victim's character under MRE 404(a)(2). We disagree, although for reasons other than those cited by the trial court.

The decision whether to admit or exclude evidence is within the trial court's sound discretion and will not be disturbed absent an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would conclude there is no justification or excuse for the ruling. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Defendant sought to admit testimony that the victim beat his former girlfriend and that it was common knowledge in the community. The trial court excluded the evidence, on the basis that evidence of a victim's propensity for violence is inadmissible absent a claim of self-defense. On appeal, defendant argues that the evidence was admissible to show a pertinent trait of character of the victim, MRE 404(a)(2), because the evidence supported defendant's claim that the victim was the first aggressor in the fight, that "he threw the first punch" and attempted to kick defendant several times.

Evidence of a victim's violent or turbulent character may be admissible even where the defendant has not claimed self-defense, for instance, to shed light on whether the killing was accidental or intentional. MRE 404(a)(2); *People v Anderson*, 147 Mich App 789, 793; 383 NW2d 186 (1985). This evidence is properly offered as reputation or opinion evidence. *People v Harris*, 458 Mich 310, 315, 318-320; 583 NW2d 680 (1998), citing MRE 405; see also *Anderson, supra* at 792. However, "the character of the victim may not be shown by specific instances of conduct unless those instances are independently admissible to show some matter apart from character as circumstantial evidence of the conduct of the victim on a particular occasion." *Harris, supra* at 315-317; see also *People v Nichols*, 125 Mich App 216, 218-220; 335 NW2d 665 (1983). Because the excluded evidence related to specific conduct, we conclude that it was inadmissible to support defendant's claim that the victim was the first aggressor.

To the extent that the excluded evidence could be characterized as admissible reputation or opinion evidence of the victim's violent character,[1] we find any error harmless. To establish preserved, nonconstitutional error requiring reversal, the defendant has the burden of establishing a miscarriage of justice under a "more probable than not" standard. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Defendant does not meet this standard given that there was other testimony that the victim beat his girlfriend, and that the evidence against him was overwhelming.

II

Defendant next argues that the trial court erred by not instructing the jury on the cognate lesser included offenses of assault with intent to do great bodily harm less than murder and aggravated assault. The trial court declined to give the requested instructions on the basis that the elements were essentially the same as involuntary manslaughter, with the distinguishing factor that death occurred. We find no error.

A cognate lesser offense is one that shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater offense. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999). If the defendant requests an instruction regarding a cognate lesser included offense, the trial court must examine the specific evidence to determine whether it would support a conviction of the lesser offense. *People v Bailey*, 451 Mich 657, 668; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996). In that regard, the trial court need not "blind itself to uncontroverted proof of an element of the greater crime that would necessarily raise a defendant's culpability to that of the more serious crime, if all elements common to the two offenses were found to be proven beyond a reasonable doubt." *Id*. at 671.

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[1] Defense counsel argued below that the nature of the deceased was "common knowledge throughout the community," which arguably was an attempt to characterize the evidence as reputation or opinion evidence.

Assuming, without deciding, that the offenses are cognate lesser included offenses,[2] the evidence in this case did not support an instruction on assault with intent to do great bodily harm less than murder or aggravated assault. Expert witness testimony that the blows inflicted during the fight caused the victim's death was uncontroverted. "[T]he crime of assault with intent to do great bodily harm less than murder presupposes that the assailant's act has not caused the death of the victim." *Id.* at 671. Although defendant argues that the jury could have disbelieved the expert testimony, defendant presented no evidence to permit the jury to conclude that the blows inflicted during the fight were not the cause of death. See *id.* at 671 n 10. Because there was no evidentiary basis for separating a death resulting from defendant's act from the theory that defendant committed only an assault, defendant failed to meet the requirement that the evidence adduced at trial support the requested assaultive offenses. *Id*. at 671-672, 674-675, 682.

Giving an instruction on a lesser offense that has no evidentiary basis detracts from the rationality and reliability of the factfinding process. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). Consequently, the trial court did not err by refusing to instruct the jury regarding the offenses of assault with intent to do great bodily harm less than murder and aggravated assault.

III

Finally, defendant contends that the trial court abused its discretion in determining the number of points to be scored under the judicial sentencing guidelines. We disagree. Matters of sentencing are reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 654; 461 NW2d 1 (1990).

Defendant argues that OV 4 and OV 7 of the judicial sentencing guidelines[3] were misscored. However, no cognizable claim may be brought on appeal in reference to the scoring of judicial sentencing guidelines because the guidelines do not have the force of law; a claim of miscalculation is not a claim of legal error. *People v Raby*, 456 Mich 487, 499; 572 NW2d 644 (1998); *People v Mitchell*, 454 Mich 145, 175-176; 560 NW2d 600 (1997). Cognizable claims may be raised on appeal where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) and the sentence is disproportionate. *Id*. at 177. None of

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[2] Plaintiff disputes that assault with intent to do great bodily harm less than murder and aggravated assault offenses are cognate lesser included offenses of open murder, the principal charge in this case. However, our Supreme Court has recognized that assault with intent to do great bodily harm less than murder is a cognate lesser included offense of second-degree murder. *Bailey, supra* at 669.

[3] The judicial sentencing guidelines remain applicable to offenses committed before January 1, 1999 and are, therefore, applicable to defendant. *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000).

these exceptions applies to the present case because defendant is merely claiming a scoring error. Therefore, defendant is not entitled to relief.

Affirmed.

/s/ Janet T. Neff
/s/ William B. Murphy
/s/ Richard Allen Griffin